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SUBJECT: SECSTATE LEGAL ADVISER ON WAR ON TERROR

Classified By: USEU POLOFF TODD HUIZINGA, FOR REASONS 1.4 (B) AND (D)

1. (C) SUMMARY: Secstate Legal Adviser John Bellinger met with a comprehensive array of EU interlocutors in Brussels on February 7-8 to discuss U.S. views on the legal framework for the war on terrorism. He stressed that U.S. decisions on how to deal with an unprecedented global terrorist threat had been made after serious consideration of all legal and political options, and that European officials must publicly underline U.S.-EU solidarity in the fight against terror. On Guantanamo detainees and Al Qaeda, Bellinger argued that the U.S. was and is acting in the context of a new form of international armed conflict, and that therefore, while the Geneva Conventions do not fit this new situation well, the rules of war provide a more appropriate framework than domestic criminal law. He discussed European concerns about the treatment of detainees. Bellinger also argued that rendition is a vital tool against terror. Finally, he urged the EU not to support a Cuban resolution at the UN Human Rights Commission on Guantanamo. The EU response to the visit was for the most part extremely positive, with the Legal Adviser of the Austrian EU presidency underlining that "the fight against terror is our (shared) struggle." Europeans, however, remain concerned about protection issues. END SUMMARY.

COMPREHENSIVE SET OF MEETINGS

2. (SBU) On February 7-8, Secretary of State Legal Adviser John Bellinger met with a wide range of EU and member-state officials, including Robert Cooper, Director-General for Common Foreign and Security Policy at the EU Council Secretariat; Jean-Claude Piris, the Director-General of the

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Legal Services of the EU Council Secretariat; Michel Petite, Director-General of the Legal Services of the European Commission; Jim Cloos, EU Council Secretariat Director for Transatlantic Relations, Human Rights and UN; and Gijs de Vries, EU Coordinator for the Fight Against Terrorism. The visit was capped by a two-and-a-half-hour discussion with the EU Legal Services Working Group (COJUR), comprising the MFA Legal Advisers of the 25 EU member states, plus Commission and Council Legal Services and Romanian and Bulgarian observers.

BASIC CONTEXT: UNPRECEDENTED GLOBAL CONFLICT

3. (SBU) Bellinger stressed that the situation in which the U.S. and its allies find themselves is unprecedented -- faced with thousands of Al Qaeda and associated terrorists around the globe whose goal is to inflict mass casualties on innocent civilians by any means possible. The legal frameworks that are readily available, the Geneva Conventions or domestic criminal law, do not fit this unprecedented situation well. In this context, the USG has thought long and hard about how best to prosecute the conflict thrust upon it in a way that is politically and legally legitimate, and the answer to the question of what the rules should be that govern the war on terror is not an easy one.

INTERNATIONAL ARMED CONFLICT WITH AL QAEDA

4. (SBU) It is clear, Bellinger said, that the military response against the Taliban and Al Qaeda in Afghanistan following the September 11 attacks, an action covered by UNSC Resolution 1373, is properly categorized as an international armed conflict. The U.S. believes that the continuing struggle against Al Qaeda remains a legal state of international armed conflict. Al Qaeda has attacked, and continues to attack, our ships, embassies, people, and territory. Its leaders have explicitly declared war on us. Therefore, the proper legal framework cannot be that of domestic criminal law. Al Qaeda is not the same as domestic European terrorist groups like the IRA or RAF because it is global and operates outside the U.S. and across borders. It is in effect a new manifestation on the battlefield, that of

"armies of terrorists." Conceptually, this is a military conflict, not a police action to round up criminals. Most detainees have been picked up by our armed forces on foreign battlefields. Practically, these cases would be virtually impossible for domestic courts to handle, since there are rarely witnesses, statements, or forensic or documentary evidence that would meet domestic standards. Accordingly, the most appropriate framework would be the rules of international armed conflict.

15. (SBU) It is important to note, Bellinger emphasized, the distinction between the President's political statement that we are part of a "war on terror" and the legal status of the international armed conflict with Al Qaeda. When the President speaks of the War on Terror after 9/11, he is taking the position that we must all declare our opposition to terrorism of any kind. The U.S. also believes, however, that it has been and continues to be in a legal state of armed conflict specifically with Al Qaeda.

DETAINEES COVERED BY GENEVA CONVENTIONS?

16. (SBU) Bellinger stressed that the current rules of international armed conflict do not fit this unprecedented situation very well. After 9/11, the U.S. carefully considered whether and to what extent the Geneva Conventions would apply. Article 2 of the Third Geneva Convention declares that these conventions apply only between High Contracting Parties. While Afghanistan was a High Contracting Party, Al Qaeda is certainly not. In addition, Article 4 dictates that a POW must be a soldier in a national army, wear a uniform with marked insignia, carry arms openly, and follow the laws and customs of war. Because the Taliban did not meet any of these conditions, they are not covered as POWs under the Geneva Conventions. Furthermore, Al Qaeda members could not be considered "protected persons" under the Fourth Geneva Convention. The Fourth Convention defines "protected persons" as civilians caught up in a conflict. Al Qaeda was not caught up in, but rather initiated, the conflict. Bellinger noted that privileges are given to POWs under the Geneva Conventions for following the laws of war, which are intended to protect civilians from harm. Al Qaeda and the Taliban completely disregard the rules of war and intentionally target civilians.

17. (SBU) If not covered as POWs or protected persons, what, then, is the status of Al Qaeda and Taliban combatants? Bellinger asserted that there is a clear gap between these terms, and that the gap is intentional. Article 5 of the Fourth Geneva Convention, he notes, specifies that "spies and saboteurs" are not granted rights and privileges under the Geneva Conventions. This designation, "spies and saboteurs," is the designation in the Geneva Conventions that most closely describes Al Qaeda terrorists. Thus, though they are combatants, they are best defined as unlawful combatants who do not have a right to any protections under the Geneva Conventions. Bellinger also explained that the term &unlawful combatant8 is not a new term but rather has been used for many years in treatises and military manuals to describe those who engage in combat, but in an unlawful manner.

18. (SBU) Bellinger added that the U.S. response to Al Qaeda attacks does not make members of Al Qaeda legitimate combatants under the Geneva Conventions. Al Qaeda does not follow the laws of war, and the fact that the U.S. is fighting back in no way renders unlawful combatants legitimate under the very laws they do not respect.

STANDARDS FOR TREATMENT OF DETAINEES

19. (SBU) If the protections of the Geneva Conventions do not apply, Bellinger said, there is the question of what rules the U.S. is applying to detainees. Accordingly, to clarify U.S. policy towards detainees President Bush issued a public directive on February 7, 2002, titled "Humane Treatment of Al Qaeda and Taliban Detainees." This directive orders that all detainees under the control of the Armed Forces be treated humanely and, to the extent appropriate and consistent with military necessity, consistent with the Geneva Conventions. In addition, the U.S. remains bound by, and committed to, the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. This includes Article 4, which prohibits torture, and Article 3, which prohibits transfers of persons to countries where there is substantial likelihood that they will be tortured. Article 3 is applied on a case-by-case basis. A country's poor record on human rights will raise a red flag, but not necessarily entail a prohibition against transferring a detainee to that country. Instead, in each individual case the U.S. seeks assurances that the person involved will not be tortured, and a transfer is only allowed if those assurances are deemed credible. Regarding Article 16 of the Convention Against

Torture, which prohibits cruel, inhuman, and degrading treatment, the U.S. Senate expressed reservations during ratification in 1995 because there was no definition of "cruel, inhuman, and degrading treatment" in the Convention. The Senate's reservation dictated that the U.S. would tie this provision to the prohibitions of cruel and unusual treatment in the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution. Because these constitutional amendments apply only to U.S. citizens in territories under U.S. jurisdiction, the Department of Justice interpreted the Senate reservation to mean that Article 16 applies only inside the United States. Nonetheless, as Secretary Rice said in December, as a matter of policy the U.S will treat detainees in a manner consistent with these standards.

10. (SBU) Bellinger described recent U.S. legislation further codifying the standards applied towards detainees. The Detainee Treatment Act of 2005, he explained, allows the Armed Forces to use interrogation techniques listed in the U.S. Army Field Manual. In addition, the McCain Amendment codifies the prohibition of cruel, unusual and inhuman treatment, as interpreted by the Senate in its reservation concerning Article 16 of the Convention Against Torture, of any detainee regardless of nationality or of where he is being held. Also, the Graham-Levin Amendment allows detainees to appeal the results of military commissions or Combatant Status Review Tribunals (see para 12) to federal courts, while limiting detainees' ability to file frivolous habeas corpus suits in U.S. courts. Bellinger also explained the President's signing statement, issued with his signature of the McCain Amendment. Bellinger said the statement is in keeping with customary presidential practice and does not indicate any intention to ignore the law. Rather, the statement explains how the President intends to interpret the law consistent with the powers conferred upon him by the Constitution. Bellinger pointed further to the public statement released by the White House at the same time, which demonstrates the President's commitment to upholding the McCain Amendment.

REGULAR REVIEW OF DETAINEE CASES

11. (SBU) Bellinger then raised some of the more troubling questions. For example, according to the rules of international armed conflict, a nation may hold detainees until the end of the conflict, when they no longer pose a threat. How long, however, will the war against Al Qaeda last? Can detainees be held indefinitely? What if some are innocent? The U.S. recognizes that these are troubling questions, but does not believe such questions could justify a decision not to detain people who represent a danger to American citizens. To deal with this problem at Guantanamo, the U.S. has created an annual Administrative Review Board process to determine, for each individual detainee, whether that detainee should still be considered as in a state of war with the U.S. This process has resulted in the release of 180 detainees and the transfer to other countries of 76, leaving approximately 500 detainees left in Guantanamo. Of those released, at least a dozen people are known to have gone back to fighting against the United States.

12. (SBU) The question has also been raised as to the possible innocence of Guantanamo detainees. As the Geneva Conventions dictate, if there is any doubt about whether or not an individual is a POW, there must be an Article 5 tribunal. Since Taliban and Al Qaeda fighters clearly did not meet the conditions necessary to be granted POW status, the President decided that Article 5 tribunals were not necessary. In 2004, however, Combatant Status Review Tribunals (CSRTs) were mandated by the Supreme Court. The CSRT process goes beyond the brief tribunals required by Article 5, providing each individual detainee with a full review. These CSRTs have resulted in the determination that there was not enough information upon which to hold a further 38 detainees.

RENDITIONS

13. (SBU) Bellinger pointed out that renditions have been used for decades to detain terrorists and criminals who cannot be extradited or otherwise detained or brought to justice. He stressed that the United States does not conduct "extraordinary" renditions for the purpose of torturing suspects or transferring them to countries in which they will be tortured. There are many circumstances in which a rendition might be the best option. In all cases, renditions are conducted in a manner consistent with international obligations and the sovereignty of other states. The U.S. would expect that states cooperating in rendition activities would also do so in a manner consistent with their domestic law.

¶14. (SBU) Bellinger sought to dispel allegations that hundreds of people had been kidnapped from European streets. He pointed out that there is no evidence for such allegations, and that the United States respects the sovereignty of European governments. On renditions, CIA flights, and other intelligence operations, the U.S. will not confirm or deny specific allegations, in order not to compromise the confidentiality of intelligence operations as such. Bellinger noted that denying five out of six such allegations would in effect confirm the sixth. The U.S. trusts that European governments will continue to follow the same policy.

GUANTANAMO AT UN HUMAN RIGHTS COMMISSION

¶15. (C) Some EU interlocutors expressed concern that some EU member states would support a Cuban resolution against U.S. actions in Guantanamo at the upcoming UN Human Rights Commission, that might be modeled after a European Parliament resolution on the subject. Bellinger warned that European support for a Guantanamo resolution would be a serious setback to U.S.-EU cooperation against terrorism, and give the unacceptable impression that the EU was aligned with Cuba against the U.S. EU Council Director-General for Common Foreign and Security Policy, Robert Cooper, said some EU member states might feel obliged to support the resolution because they had agreed last year not to in return for U.S. commitment to allow the UN Special Rapporteur on Torture, Manfred Novak, to visit Guantanamo; now, the U.S. had gone back on that agreement. Bellinger explained that the U.S. had invited Novak to visit, but that Novak had chosen publicly to reject the U.S. offer (to visit under normal conditions, but not to be able to interview individual detainees, as only the ICRC may do that). Cooper said the EU, having cooperated with the U.S. in resisting Chinese attempts to impose conditions on visits of Special Rapporteurs, was having difficulty justifying the U.S. attempts to impose conditions on Novak's Guantanamo visit. Both sides agreed that the U.S. and EU needed to consult further in order to avoid a train wreck at the Human Rights Commission on this.

EUROPEAN REACTIONS POSITIVE FOR U.S.

¶16. (C) COMMENT: By and large, Bellinger's European interlocutors responded very positively to his visit. Their questions were many and varied, and all of the meetings were marked by vigorous but constructive discussion. It is clear that many Europeans continue to believe that Article 3 of the Geneva Conventions can be applied to enemy combatants, and still afford the United States the flexibility it seeks. It is also apparent that lingering concerns (fed by negative public perceptions) remain about the treatment of detainees, and protection against wrongful detentions. Some governments remain focused on renditions, and the possibility that there will be negative revelations that impact on them directly.

¶17. That said, the visit was very helpful in beginning to dispel European misunderstandings and misgivings about our pursuit of the war on terror. Continued engagement on these issues is critical in the coming months to persuade EU governments to stand more firmly and publicly in the face of their public's concerns and suspicion regarding Guantanamo, renditions, and the legality of U.S. actions against Al Qaeda. The Austrian Chair of the COJUR meeting, Ferdinand Trauttmansdorf, concluded the meeting with the following message: "We leave this discussion with the notion that America is carefully considering these difficult questions in good faith." He said also that the fight against terror was a burden shared by the EU, and that the U.S. has as much of a right to ask questions of the EU, as the EU does of the U.S. On the upcoming Human Rights Commission, urgent consultations with the EU will be necessary to avert the possibility of EU support for a Cuban Guantanamo resolution.

¶18. (U) This message has been cleared by Legal Adviser John Bellinger.

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